No. 842

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

SUPREME COURT, U.S.
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FREDERICK T. ZUBER, ET AL.,

Petitioners,

v.

RUSSELL ALLEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
for the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENTS RUSSELL ALLEN, ET AL., IN OPPOSITION TO PETITION OF FREDERICK T. ZUBER, ET AL., FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 861

FREDERICK T. ZUBER, ET AL.,

Petitioners,

v.

RUSSELL ALLEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS RUSSELL ALLEN, ET AL., IN OPPOSITION TO PETITION OF FREDERICK T. ZUBER, ET AL., FOR A WRIT OF CERTIORARI

OPINION BELOW

The Opinion of the Court of Appeals is reported at 402 F.2d 660 and is also set forth in the petition filed in No. 874, together with the opinion of the lower court in the related case of *Blair v. Freeman,* 370 F.2d 229 (1966).

JURISDICTION

The jurisdictional prerequisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether, under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), the Secretary of Agriculture was authorized to include in the Massachusetts-Rhode Island milk order of October 1, 1964, a nearby farm location differential provision 7 C.F.R. 1001.72, under which producers whose farms are located in either of two designated "nearby" areas are entitled to receive a differential payment which varies the uniform price required under Sec. 8c(5)(B)(ii) in recognition of (1) the use made of nearby producers' milk or (2) the allegedly higher prices received by nearby producers prior to Federal regulation, the aforesaid section providing that all producers are to receive a uniform price for all of their milk irrespective of the use thereof.

2. Whether the nearby differential provision promulgated on October 1, 1964, is an authorized adjustment to the uniform price, either under Sec. 8c(5)(B)(ii)(c) concerning "the locations at which delivery of such milk is made", or under (a) relating to "market * * * differentials customarily applied by the *handlers*", when such payments are made by "non-nearby" dairy farmers regularly supplying the fluid milk market to other producers whose farms are located in certain designated "nearby" areas, and when the "nearby" producers are already compensated for any location value of their milk under the zone differential of the milk order, 7 C.F.R. 1001.62, which includes an additional payment over the uniform price and includes (1) the authorized market differential for direct delivery of milk to a city plant or market; (2) the transportation differential paid for milk delivered progressively closer to the primary market; and (3) the higher transportation rates paid within the "nearby" zone as contrasted with the rates for each 10-mile zone in the balance of the milkshed.

3. Whether the Secretary's findings were deficient, inconsistent and unsupported by valid and substantial evidence, and his conclusions and decisions irrational, inconsistent and arbitrary.

4. Whether the operation of the nearby differential is illegally discriminatory and violative of constitutional rights to due process and equal protection of law.

STATEMENT

The respondents' statement is set forth in their brief in opposition to the petition of the Secretary in No. 1076 in respect to the facts relating to the issues in the case, and their petition and reply brief in No. 874 sets forth the proceedings in the courts below. The respondents have prosecuted this action as a class action for all dairy farmers similarly situated in Vermont, Maine and New Hampshire, an Order to such effect having been entered by the district court after a full hearing on such question. The respondents there offered to increase the number of individual plaintiffs to 500 or 1,000 if the district court so desired, and additional names recently filed in the district court would bring to over 500 the number of individual plaintiffs herein.

The respondents do not propose to burden this Court with briefs *amicus curiae* by other interested organizations, although offers have been made to support respondents' position in this Court, and they note that the Secretary received more written exceptions from interested persons, organizations, government officials, etc., when he proposed the continuation of the nearby differential than on any other proposal in recent years. A number of such exceptions were filed below, including the following from the National Grange:

> "The National Grange has received communications from Granges affected by the proposed Massachusetts–Rhode Island milk marketing orders as stated

in Vol. 32 – Number 129 of the Federal Register, dated July 6, 1967. They have particularly objected to the decision to maintain farm location differentials in the Mass.–Rhode Island market, an objection in which we would join. The recent court decisions indicate that this can be thrown out in the courts, that it is unfair in the present situation, and that, in our judgment, this section should be deleted from the proposed order." (Letter of 8/25/67 from Harry L. Graham, Legislative Representative, National Grange, Washington, D.C., to Hearing Clerk, USDA).

SUMMARY OF ARGUMENT

The petition herein and in No. 1076 is a belated application for review of the unanimous decision of the court below in *Blair v. Freeman*, 370 F.2d 229 (1966), wherein the identical question was posed to that court: "1. Whether, under the agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 et seq.), the Secretary of Agriculture is authorized to provide in milk marketing orders for the payment of a differential to nearby producers." No petition for a writ of certiorari was filed in that case, and the Secretary terminated the nearby differential of the New York–New Jersey milk order because said provision did not effectuate the purpose of the Act. Producers in that large market and throughout the country have relied on said decision as an accepted fact that the nearby differential was illegal, particularly when such a differential exists only in the Connecticut order out of about 75 federal milk orders. Additionally, the Secretary admitted in *Blair* that the Boston differential involved herein was "identical in purpose and effect" and issued on "very similar findings". He further acknowledged that the Congressional definition of the "market differential" authorized by the Act was correct,

and that he had always promulgated the nearby differentials as a "location differential" under Section 8c(5)(b)(ii)(c) of the Act, a fact that acknowledges the error of the dictum in *Green Valley Creamery v. United States,* 108 F.2d 332, and the district court decision in *Cranston v. Freeman,* 290 F. Supp. 785. The repeated relitigation of the same issue and belated application for certiorari should not be approved by this Court when thousands of dairy farmers have relied on the *Blair* decision and the failure to seek certiorari in that case.

The petitioners' contentions that certain "nearby" producers may be paid a non-uniform price on the basis of the past use of their milk conflicts with the decisions of this Court and lower courts, and such interpretation of the plain language of the statute would render it a nullity. The legal validation of such a discriminatory preference would open the floodgates for the issuance of similar devices based on political and group pressures for such favored treatment. It would complicate mounting problems of rural and urban areas by forcing more small farms to abandon production with resultant loss of income to the dairy farmer, small businesses and the community, for the non-nearby farmer is unable to sell his land for housing developments or commercial development like the nearby producer.

The termination of the differential would not injure nearby producers, in that the Act and milk order provide only for *minimum* prices, and he may receive any premium over and above the minimum price from handlers if the nearby milk actually does have any extra value whatsoever. The fact that the Connecticut differential returns but 2-cents per cwt. to nearby producers at a cost of 44-cents per cwt. to "non-nearby" producers is indicative of the fact that nearby milk has no additional value, for nearby producers would be able to obtain the 2-cents differential if such milk did have any extra value.

The petitioners have failed to indicate any value of nearby milk that is not already compensated for under the zone differential of the order for transportation charges and direct-delivery, and the factor of seasonality or evenness of production is compensated for under the seasonal incentive plan of the order. Moreover, the Secretary has specifically found that the other items mentioned by petitioners are not grounds for the issuance of the nearby differential, and no proper purpose could be served by remand to the agency. The nearby differential is in conflict with the principles enunciated by this Court, and the district court decision in *Cranston* is in conflict with its own circuit and patently erroneous.

ARGUMENT

I. THERE IS NO IMPORTANT UNSETTLED QUESTION

This matter has been treated to some degree in the respondents' brief in opposition to the petition of the Secretary in No. 1076, and the respondents emphasize the following in this brief:

1. The Secretary admitted in his brief in *Blair v. Freeman,* 370 F.2d 229 (1966), that he had always promulgated the nearby differential as a location differential under Section 8c (5)(B)(ii)(c) of the Act in the few orders that contained such a provision. He quoted approvingly from the Congressional definition of the market differential set forth in the reports of the House and Senate to evidence that the nearby differential could not be promulgated under subsection (a) of the Act as a market differential. The Secretary thus admitted that there was no ambiguity as far as he was concerned, and he stated in his *Blair* brief, filed as an exhibit below, that the Greater Boston nearby farm location differential of 1937 was "identical in purpose and effect" to the

New York–New Jersey nearby differential considered and invalidated in *Blair*, further stating that they were issued on "very similar findings".

The Secretary refused to seek certiorari in respect to the unanimous *Blair* decision, and he thereafter terminated the differential provision for failure to effectuate the purpose of the Act. Although the Secretary and *amicus curiae* in *Blair* argued that the nearby differential had been in existence since 1938 under the predecessor New York order, they made no claim in law or equity to the escrowed monies of the non-nearby producers in that case. If the Secretary acknowledged in *Blair* that he had always promulgated the nearby differential as a location differential under subsection (c) and that no ambiguity existed in respect to his purported source of authority, it is respectfully submitted that the questions set forth by both petitioners have already been answered in the negative by both the Secretary and the court of appeals in *Blair*. Petitioners may not seek a belated review of that case more than two years later and when there admittedly is nothing for the Court to review because of said admissions. The fact that there is a large escrow fund of the respondents' monies involved in this case does not justify a disavowal of past admissions in order to seek the respondents' monies through remand to the Secretary when such course was not pursued in the *Blair* case.

2. The facts in this case serve only to emphasize that the writ should not be granted, for it was only through political pressures that the Secretary sought a stay of judgment in the district court and subsequently prosecuted an appeal from the judgment.[1] After denial of said stay the Secretary indicated that he probably would

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[1]The following acknowledgment in the Connecticut Milk Producers' Association Bulletin of Nov., 1967, also admits that the CMPA is maintaining *this* case in the name of the 7 petitioners;

not appeal the case, and various news media advised to such effect and that the nearby differential was a dead issue. Indeed, the 7 petitioners were only allowed to intervene after judgment in order to afford them the protection of appellate review, since it did not appear that the Secretary was going to appeal. Although such an appeal was taken by the Secretary, it is the opinion of respondents that this was done in order to give some substance of governmental approval to petitioners' appeal. After the unanimous decision below, the Secretary requested the full 90 days to determine whether to petition for certiorari. Thereafter, the Secretary petitioned this Court for an extension of time of sixty days in order to study the question as to whether a petition should even be filed herein. After all the foregoing indecision and obvious lack of confidence in petitioners' position, the Secretary's petition and other briefs filed herein reflect only the same unsubstantial arguments, a number of which are clearly inaccurate and at variance with his own prior findings. Indeed, he now joins with the 7 "nearby" petitioners to suggest as a basis for

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"CREDIT–WHERE CREDIT IS DUE. In all of our discussion of the nearby differential litigation *we* would be very remiss not to acknowledge publicly our appreciation for the support of our Congressional delegation, particularly Senator * * * and Congressman * * *. At one point the Attorney General appeared to be vacillating on his support of *our* "motion for a stay in *Allen v. Freeman.* This was a very critical issue, for failure to seek a stay of the District Court's order terminating the nearby differential would have undercut the Government's arguments on the merits, since failure to seek a stay would have implied a lack of confidence that its arguments would prevail. Furthermore, without a stay the escrowed funds would have been paid out and it would have been impossible to recover those payments, when (not if) *we* win. So the intervention of Senator * * * on *our* behalf was invaluable."

attempted remand a number of proposals that has heretofore denied because disorderly marketing would result therefrom and which admittedly could only injure producers and consumers alike or be without his statutory power. In view of these circumstances and the failure to ever cite a valid reason for the nearby differential after years and years of exhaustive consideration of such issue in numerous administrative hearings, the respondents are reluctantly forced to conclude that the same political pressures that gave rise to the differential in 1937 are again insistent that a final attempt be made to disburse respondents' monies to preferred nearby associations and attorneys, such procedure being also calculated to discourage any future challenges to the administrative authority by grass-roots dairy farmers. Significantly, attempts to accomplish this very objective on a number of occasions in the last Congress met with failure, the attempt being made to require such remand to the agency under the guise that respondents were being accorded an "administrative remedy". It is obvious that individual farmers could not afford the legal and expert assistance necessary over a period of years in administrative proceedings, and that the real intent was to deprive farmers of the right to challenge unauthorized regulations in a court of law. No proper basis for remand to the Secretary is even suggested by petitioners.

3. The 7 petitioners are already compensated under the order for any location value of their milk by virtue of the zone differential of the order, the same providing for payment over and above the uniform price for transportation and direct-delivery factors. 7 C.F.R. 1001.62. They are compensated for seasonality or evenness of production by reason of the seasonal incentive plan of the order, 7 C.F.R. 1001.65(c), whereby monies are deducted in certain months from the pool and placed in a fund for payment over in other months in order to reward producers for this factor. (See. App. E, p. 11e

and pp. 4-10e). The nearby producers would be obtaining a double payment for such factors by virtue of the nearby differential payments, and the petitioners have cited no element of value or service for which they are not already compensated or which admittedly should not be paid by the handlers subject to the order. They have already exacted millions of dollars from the respondents' pockets through an illegal discrimination, and the respondents respectfully submit that further irreparable delay is not justified under such circumstances, particularly when a speedy disbursement of respondents' monies through the district court would enable many marginal producers to stay in business.

The grave problems engendered by such dislocations, for the cities as well as the rural areas, are currently receiving widespread attention by private and governmental agencies. Small businesses and communities are thus deprived of needed income or tax revenues, and the migration of the children and hired help of such ex-farmers to the cities results in added financial burdens for the cities when such individuals are ill-equipped for urban absorption. No economic opportunity exists for such individuals in either area, for there are no alternative economic opportunities available in most rural areas when a farm is forced out of business, and the farm worker's opportunities are similarly limited in the cities because of his lack of a skill needed to survive independently in the urban area. The rural farmer is unable to sell his farm for a housing development or commercial development at huge profits, and he is unable to hold his land at low tax rates with this objective in mind. The Court may note that this problem has been receiving substantial attention in the State of Maryland and other states where the population is increasing at rapid rates. The State is deprived of needed revenue as some of these farms are operated at a minimal level or by "tax farmers" who are not interested in running an

efficient business. Petitioners respectfully suggest that they should not be forced to subsidize such "nearby" farms, and that the nearby differential precipitates and perpetuates the very problems for rural and urban areas that a number of governmental and private bodies are seeking to solve.

4. The Act provides only for the payment of a *minimum* price, as this Court and many lower courts have noted on many occasions, and there is nothing in the Act or order that precludes the handler from paying an identical differential to the nearby producers if their milk actually does have any extra value. Consequently, petitioners would suffer no financial injury if their claims are sound. Any contrary contention or insistence that smaller dairy farmers pay the differential is an admission of the lack of merit in their claim of extra value for their milk, and the grounding of such differential on historical use prices is also an admission that no current justification exists for the nearby differential payments. Handlers will pay for a real but not an illusory value, and it is manifestly unfair to exact such penalty payments from smaller dairymen who already sustain a reduction in their uniform price because of the deductions for transportation and handling charges. The handler should be the one to pay for any value or service that he receives from nearby milk, and the discrimination in price for an identical product is further compounded by forcing the smaller farmer to pay the discriminatory difference from out of his own milk price. This Court has consistently held such action to be violative of the Constitution, and there is no unsettled question in this respect.

5. A number of decisions of this Court set forth the basic requirement of the Act that all producers are entitled to a uniform price for their milk irrespective of the manner in which it is used by the handler, and

the Secretary's brief filed in *Blair* (p. 19) states as follows in this regard:

> "As noted above, one of the fundamental objectives of the provisions of the Agricultural Adjustment Act relating to the marketing of milk is to insure that the producers will receive uniform minimum prices for their milk regardless of the use made by the handlers of their particular production."

The petitioners now appear to argue that the Secretary may consider the use of their milk in forcing respondents to pay part of their milk price in the form of the nearby differential, and that the proscription in the Act merely means that the Secretary shall not consider the use of the milk by the individual handlers in regulating the handlers through marketwide pooling. The utter lack of merit in such a contention is readily apparent, for the purpose of the "irrespective of use" command is to insure producers of a uniform price for their milk, and this is the very reason for such regulation and the existence of marketwide equalization pool or producer settlement fund. The petitioners make a statement which actually says nothing when they say that "irrespective of use" refers only to the difference between individual–handler pooling and marketwide pooling and the regulation of handlers under such pooling. It is elementary that the words have a purpose and are directly concerned with assuring the payment of a uniform price to all producers for all of their milk irrespective of the use made thereof. Moreover, all producers serving the same handler under individual–handler pooling receive a uniform price for their milk based on the average use made of the milk of the producers supplying such individual handler, i.e., irrespective of the use of *their particular milk* by said handler. Clearly, the petitioners have demonstrated a fundamental unawareness of the plain purpose and language of the Act, and the illogical contentions are extended to such

a degree in the brief *amicus curiae* of the State of Rhode Island that they actually stress the fallacy and delusive reasoning of the petitioners. Merely to state such argument is to reject it, and the petitioners' further argument that there is no violation when payment of the differential is based on past use of the nearby producers' milk rather than on the current use thereof by the individual handler is even more illustrative of the utter lack of merit in such reasoning. Such contentions ultimately led the *Cranston* court to confuse the identity of the recipient of the nearby differential with the basis for its issuance by the Secretary.

The respondents respectfully submit that this Court and many lower courts have recognized on a number of occasions that the Act and marketwide equalization could not function under the inconsistent interpretation urged by petitioners, an interpretation that conflicts with the very purpose of the Act, the prior contentions of both petitioners, and the former assertions of the Secretary that acknowledged the lack of any ambiguity in this regard.

6. The findings of the Secretary openly acknowledge that the nearby differential is an exception to the Act and authorized marketwide pooling of milk, this Court also having consistently held that an administrator has no power to amend the statute under which he functions. The specific enumeration of the allowable adjustments to the uniform price and other prerequisites to issuance of an order and the terms and conditions therein circumscribe the power of the Secretary, although the respondents readily admit his discretion to apply the enumerated terms and conditions under appropriate circumstances in the exercise of his expertise. However, the nearby differential devours the entire Act, and the rule of uniformity is emasculated by the exception thereto. The respondents know of no decision by

this Court which would authorize an admitted deviation from the statute for the benefit of a group of preferred participants in a government-sponsored program, and this Court has recognized that this Act was passed to relieve the financial plight of all dairymen and the threat to the consumer and public interest resulting from a disorderly market.

7. The principles enunciated by this Court in *Baldwin v. Seelig,* 294 U.S. 511, *Hood & Sons v. DuMond,* 336 U.S. 525, *Lehigh Valley Farmers Co-op. v. United States,* 370 U.S. 76, and *Polar Co. v. Andrews,* 375 U.S. 361 are also dispositive of the questions presented by the petitioners. Neither State officials or nearby producers may legally claim a vested right in a particular milk market under the Act, and their contentions that the Secretary may set up economic barriers to the free flow of milk under the guise of fixing prices is in conflict with the decisions of this Court and the Act's provisions for equal sharing of the benefits and burdens of the market:

> "The power which we deny to Florida is reserved to Congress under the Commerce clause, * * *. This provision, as the Court explained in *Lehigh Valley Farmers Co-op., Inc. v. United States,* 370 U.S. 76, was intended to prevent the Secretary of Agriculture from setting up trade barriers to the importation of milk from other production areas in the United States. We seriously doubt that Congress, *in denying the power to the Secretary,* thereby granted it to the States."
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> * * *
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> "The principles of *Baldwin* are as sound today as they were when announced. They justify, indeed require, invalidation as a burden on interstate commerce of that part of the Florida regulatory scheme

which reserves to its local producers a substantial share of the Florida milk market."

In view of the fact that the Secretary himself noted the unfairness and ineffectiveness of State programs designed to reserve preferential prices and fluid markets to local producers to the exclusion of "outside" producers, or a greater share thereof in deficit markets, it is indefensible to perpetuate such illegal preferences under a federal program at the insistence of a few influential producers. One deviation leads to others, and this is what occurred in the secondary markets adjacent to the Boston area, all without any justification and to the injury of many non-nearby producers who had regularly supplied such secondary markets on an equal basis, exclusive of transportation costs and in some instances handling charges. It is obvious that such nearby differential could not have existed prior to federal regulation and that it was never paid by handlers, a fact which is evident from the handlers' refusal to comply with the Act for an extensive period of time and by the lack of a marketwide equalization pool or producer settlement fund to effectuate such payments among hundreds of handlers and thousands of producers. Moreover, handlers would not pay premiums for a non-existent value and were hardly desirous of excluding less expensive milk from the market, a fact which this Court has also set forth in a number of cases.

II. THERE IS NO CONFLICT IN CIRCUITS OR WITH THE DECISIONS OF THIS COURT.

Respondents respectfully submit that the petitioners fail to comprehend the actual holding of this Court in the *Rock Royal* and *Hood* cases,[2] in that their primary

[2] *United States v. Rock Royal,* 307 U.S. 533; *H. P. Hood & Sons v. United States,* 307 U.S. 588.

contention concerning exemption from the uniform price and equalization pooling provisions of the Act was rejected by the Court in those cases. In effect, the petitioners attack the statute and its constitutionality when they seek to nullify its very purpose by maintaining that they are entitled to payment based on the past use of their milk and retention of allegedly higher "historical prices" that admittedly have no current justification.

This Court held in those cases that the Congress could require handlers to pay the excess of their fluid sales over the marketwide uniform price into the marketwide equalization pool or producer settlement fund for transfer over to other handlers who would thus be able to pay their producers the marketwide uniform price, the latter handlers having disposed of their milk at an average price below the uniform price because of the lack of a high fluid utilization for their milk. The handlers with primarily fluid milk sales claimed that such an arrangement was unconstitutional; that they were being discriminated against by such provisions of the Act; that they were entitled to pay such excess over the uniform price to their own producers for a variety of reasons, and that such an arrangement would unjustly reward handlers with whom they were in competition.

The Court rejected all of their arguments in upholding the constitutionality of the Act and noted that handlers were only required to pay the *minimum* prices for the milk according to the nature of their sales. The Court held that the handlers were required to account to the marketwide equalization pool or producer settlement fund on the basis of their average sales at such minimum prices, and it is obvious that the handlers had no standing to even raise a question as to the operation of the pool or fund and the disbursements to producers therefrom. The Court's opinion necessarily held that the

public interest predominates over any narrow interest of a few handlers or producers, and that the very disorder of the markets necessitated the enactment of such program for the general benefit of producers and consumers alike. Moreover, the record below is replete with admissions that the Act and order program benefited nearby producers as much, if not more, than other dairy farmers, the findings of the Secretary actually stating that nearby producers receive an established price which may be higher than in the absence of regulation and are assured that they will not lose their markets to other producers. It is evident that any other holding by this Court would have effectively nullified the statute and entire program enacted by the Congress as its solution to the national emergency then confronting the dairy farmers and milk consuming public. Moreover, the fact that the Act requires the payment of only minimum prices is of especial significance, since any producer is thus able to receive any premium over the uniform price that his handler might find warranted because of any extra value or service connected with his milk.

The petitioners, however, pursue the same arguments that were rejected by this Court and contend that the handler need not account to the pool or fund on the basis of his sales at the minimum use prices. They contend that the marketwide uniform price need not be computed and paid on such basis, but that their handler may retain a portion of his average sales at such minimum prices for payment over to nearby producers on the basis of the higher utilization of their milk for fluid purposes prior to the Act. Respondents respectfully suggest that petitioners are merely repeating the arguments that were rejected by this Court thirty years ago, for it is elementary that the petitioners and such handlers with a high fluid utilization seek the same objectives – to avoid equalization or price uniformity in order to retain the higher prices associated with a

fluid milk outlet. If the decision of this Court rejected the handlers' arguments that they should be able to pay the excess of their fluid sales over the uniform price to their own producers, rather than into the pool or fund for transfer to other handlers and the latters' producers through a uniform price, then it is submitted that the petitioners' contentions are simply untenable and in conflict with the rulings of this Court from *Rock Royal* and *Hood* to the present time. Indeed, the quotation set forth by petitioners from this Court's opinion in *Rock Royal* clearly states that each producer is to receive a uniform or weighted average price for his milk irrespective of the manner of its use. The inconsistency of petitioners' contentions could not be more apparent.

Respondents make the further observation that the briefs of the Secretary and the handlers in *Rock Royal* do not constitute a part of the opinion of this Court in that case. Nor do such briefs of opposing interests bind the respondents, particularly when no producers were before the Court and when petitioners fail to understand the nature of the arguments made by the parties therein for their own particular interests. The court below recognized the lack of merit in the petitioners' contentions, for the *Rock Royal* case was fully considered in both this case and *Blair.*

Petitioners are aware that the differential referred to in *Rock Royal* was included in the New York Metropolitan milk order promulgated by the Secretary on August 9, 1938 (3 Fed. Reg. 1945), and that it provided for the payment of a differential of 25-cents per cwt. on all milk *delivered to plants* located in certain counties in the marketing area. Article IV of said order, entitled "Minimum Prices", specifically stated that, "Payment of the minimum prices for milk received *direct* from producers shall be in accordance with Article VII", and that article provided for payment of

the differential "in the case of *plants* located in the counties listed in paragraph 8 of section 1 of Article VI, the latter provision providing for the payment of the differential "for all net pooled milk received from producers *at plants* in the counties or portions of counties listed below in this section".

In order to "overcome" the plain language of the order provision for payment of said differential to any producer for the direct-delivery of milk to the plants located in the marketing area, the petitioners cite selective excerpts from the briefs of opposing interests to change not only the opinion of the Court but the plain language of the order which specifically refers to the location of city plants rather than to producers' farms. The Act authorizes a market or direct-delivery differential for the savings effected in handling costs when milk is delivered directly to the city market or distribution plan instead of initially to the country plant where double handling costs would be involved. Moreover, the Secretary has included such a differential in the New York-New Jersey and Connecticut orders, as well as in the Massachusetts-Rhode Island order involved herein,[3] and the very existence of such market or direct-delivery differential in such orders evidences the correctness of the Congressional definition and the impossibility of substituting the present nearby differential based on farm location for such authorized market differential.

Petitioners acknowledge the infirmity of their own contentions when they actually resort to argument which obviously admits and simultaneously attempts to avoid the plain language of the order provision involved

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[3]The authorized market differential is actually termed a "direct-delivery" differential under the N.Y.–N.J. order, and it is combined with the transportation differential under the Mass.–R.I. and Conn. orders where it is referred to as a "zone differential" or "plant zone differential". See 29 Fed. Reg. 11211 and 32 Fed. Reg. 9917.

in *Rock Royal* concerning payment of the differential for direct-delivery of milk at city plants. Their illogical contention that "a range of mountains made delivery to the plants feasible only for farmers residing in the 18 counties" is clearly an attempt to change the language of the New York order to that excerpted from the Secretary's brief in *Rock Royal,* a party adverse to the respondents in this action.[4] Such a contention attributes an inconsistent action to the Secretary in respect to not only the New York order provision but the early Greater Boston provisions which specifically gave a direct-delivery differential payment of 21-cents per cwt. to producers whose farms were located more than 40 miles from the market center. Such action by the Secretary necessarily admits that non-nearby producers were delivering part of their milk directly to the market in the early 1930's.

The petitioners' contention that only nearby producers could deliver their milk to the marketing area because of "a range of mountains" is an obvious horse and buggy argument. It bears great analogy to their contention that bulk tank trucking did not originate until about 1958 and that the lower court was in error in contending otherwise. The lower court correctly noted that the factor of delivery was subordinated to the location of the farm in order to forever preclude the respondents from acquiring the challenged differential. Additionally, the improvements in transportation, roads, refrigeration, packaging, etc., lowered the premium paid for direct-delivery of milk and precipitated the nearby producers'

[4]Petitioners also attempt to change the decision of this Court in that case concerning the status of said association as a handler with resultant inability to question disbursements from the pool. They also fail to note that such associations were refusing to comply with the Act.

demand for a differential limited to farm location which would be both exclusive and permanent for nearby producers. These facts are self-evident and a matter of record, the petitioners' assertion that the lower court's observation reflects "a lack of judicial comprehension" being simply another instance in which petitioners demonstrate an unfamiliarity with the facts and this particular subject. It is clear that they confuse bulk tank trucking with the more modern practice of installing bulk tanks on the dairy farm and other technological improvements in bulk tank hauling of milk. Indeed, the very document referred to in their brief in alleged support of their other assertions (H.R. Doc. 501 (1936), states as follows in respect to tank truck shipments prior to 1936, the below-listed table of tank truck shipments for the period 1920-31 for the Philadelphia milkshed being taken from the publication of The National Milk Producers' Federation, *History Series No. 3,* Oct. 1, 1932, p. 31.

> "When country receiving stations were first introduced, milk was shipped to city processing plants in milk cans. The mechanical or physical loss, caused by milk adhering to the inside of the can and by spillage, was considerable but unavoidable. By far the major part of the shipments went via railroad refrigerator cars.
>
> The development of *milk tanks* for railroad cars *and later for motor trucks, as good roads became more common,* decreased the mechanical loss in shipping milk, as less surface was exposed to the milk. In addition, the cost of washing the tanks was much less than washing the number of milk cans necessary to hold corresponding quantities of milk.
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> Milk shipped via railroad is unloaded at city railroad terminals and hauled by truck to the city processing plants. Milk shipped from the country

station by motor truck, however, is unloaded directly at the city processing plants, and terminal costs, of course, are eliminated.

The introduction of milk tanks and the improvement of roads have made it possible for those Philadelphia distributors using them to decrease their costs of hauling milk from country receiving stations to city processing plants. The increase in use of motor trucks for hauling milk into Philadelphia and the decrease in use of railroads for this purpose since 1920 are clearly shown by the following tabulation:

Trend of milk shipments into Philadelphia,[1] 1920–31

Year	Percentage by trucks	Percentage by railroad	Year	Percentage by trucks	Percentage by railroad
1920	2.1	97.9	1926	29.7	70.3
1921	9.6	90.4	1927	38.6	61.4
1922	14.1	85.9	1928	50.7	49.3
1923	20.1	79.9	1929	51.4	48.6
1924	23.2	76.7	1930	51.7	48.3
1925	26.6	73.4	1931	55.3	44.7

The respondents respectfully submit that petitioners are totally in error in attempting to rewrite the differential contained in the old New York order and in claiming that all "non-nearby" dairy farmers were unable to deliver their milk directly to the market in the 1930's. Respondents agree that the Act authorizes the payment of such a market or direct-delivery differential to all producers by the handler under Section 8c(5)(A) of the Act relating to handlers. They respectfully disagree, however, that the non-nearby producers may be forced to make the same payments authorized to be made by handlers under the Act, and the very difference in their status illustrates that the terms "handler" and "producer"

are not used interchangeably in the Act. Such a contention is totally lacking in merit, as is the petitioners' attempt to saddle respondents with the actions or lack of action by the parties in *Rock Royal.* The Court was concerned only with handlers in that case and their strained claims involving alleged discrimination because of the operation of the transportation differential to the advantage of their competitors. But the Court did note that the district court had found the differential payments to producers from out of the pool, rather than totally from handlers, to be discriminatory *as among producers,* a claim that the handlers had no standing to interpose in the case. This Court further noted that it would view as a serious matter any discrimination based on the use of milk, stating at page 580 that "If the cooperative members were freed of the burden of carrying their proportion of milk going to manufacturing use, the discrimination in their favor would be the most strongly marked." The petitioners thus claim a conflict between *Rock Royal* and the lower court when those two cases are in agreement and petitioners' contentions in conflict therewith.

The respondents have no quarrel with the market differential or any of the other adjustments to the uniform price authorized, enumerated and defined in the Act or Congressional Reports. The respondents agree that the uniform price is subject to the enumerated adjustments for quality, location and other usual market variations, as contended by petitioners quotation from the *Rock Royal* case. This identical statement is also found in the *Blair* decision that held the nearby differential of the N.Y.–N.J. order to be unauthorized and void: "However, the Act provides that this uniform minimum price is subject to adjustments for differentials authorized by the Act for quality, location, or other market variations". (125 U.S. App. D.C. 207 at 211, 370 F.2d 229). But this language obviously does

not indicate approval for the wholesale inclusion of any type of differential into a milk order as a "market differential", and the reliance of petitioners upon such an insubstantial contention illustrates the dearth of support for their arguments. If petitioners' reference to such language was sound, it is clear that the Act would have simply provided for "all market differentials" instead of the specific enumeration of the *only* authorized adjustments and the definition thereof in the Congressional Reports.

The *Blair* case itself recognizes the utter lack of merit in such a contention when it states, "Although Section 8c(5)(B)(a) does permit 'market * * * differentials customarily applied by the handlers' concerned, it is plain that this type of allowance turns not on the location of the producers' farms but on the nature of the market to which they deliver their milk. The 'market differential' rationale is plainly not a tenable basis for the nearby differential." The *Blair* case also noted that the Secretary did not even attempt to justify the nearby differential on such ground, either in the findings of the Secretary or in his brief filed in *Blair*, a copy of which has been filed in this case as an exhibit. His brief actually cited the definition of the market differential contained in the Congressional reports to evidence that it was a specific differential and that the nearby differential could not be promulgated on such basis under Section 8c(5)(B)(a) of the Act. The Secretary there contended that such fact supported his issuance of the nearby differential as a location differential, and he also admitted that he had always promulgated the nearby differential, including that of the Greater Boston milk order referred to in *Green Valley*,[5] as a location differential under

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[5] See App. C, pp. 14-160c, of Appendix to respondents' brief in opposition to brief *amicus curiae* of State of Connecticut.

subsection (c) of the Act. The Secretary thus admitted the error of the dictum in *Green Valley* in respect to such nearby differential being a market differential, and his "long-standing contemporaneous administrative construction of the Section" makes this crystal clear:

> "Thus, dating almost to the very enactment of 7 U.S.C. 608c(5)(B)(c) the Secretary has construed *that* provision as permitting the very type of nearby differential which the appellants would have this Court declare unauthorized. It is, of course, axiomatic that such a long-standing contemporaneous administrative construction of the Section by the official charged with its administration is entitled to great weight."

Although the foregoing admissions conclusively reflect that the nearby differential was never promulgated or regarded as a market differential and that the Secretary acknowledged the correctness of the Congressional definitions for 35 years, the petitioners attempt to avoid such fact by referring to language used by this Court in *Brannan v. Stark,* 342 U.S. 451, wherein the Court noted that *Green Valley* had upheld a differential between cooperative and non-cooperative milk as a market differential under Sec. 8c(5)(A)(1), the latter section pertaining to payments by handlers as in the *Rock Royal* case. A proper understanding of the authorized market differential indicates that there is no conflict with the *Stark* case and the decision below. As previously stated, the market or direct delivery differential, whether issued as a separate differential or combined with the transportation allowance as a zone differential, is based on the nature of the market or plant to which a producer delivers his milk and cannot be equated with the nearby differential that is based on the location of a producer's farm. The market differential is paid for the savings effected when milk is delivered directly to a city market

or plant rather than to a country plant where double handling costs are involved, the milk being tested, weighed, cooled, etc., at such country stations prior to shipment to the city market or distribution plant. The amount of the market or direct-delivery differential is usually the difference between the handling costs at the city and country plants. The market differential in *Green Valley* between the prices received by cooperative associations and producers who were not members thereof was based on the marketing services performed by the cooperative association, such as the aforesaid testing, weighing, cooling, etc., of the milk, and the defined market differential was not violated thereby. The market differential, as previously indicated, represented the difference in the cost of receiving the milk at a country plant and a city market or plant. If the cooperative association performed the marketing services for the producer, it would be entitled to part of the difference in costs incurred by it under the "market differential" definition. The Act specifically authorizes payment to all producers and "associations of producers", and Section 8(c)(5)(E) authorizes appropriate deductions for the verification of weights, sampling and testing of milk, even when such marketing services are not performed by associations. All that need be noted here is that associations perform certain marketing functions in handling their members' milk, services that were performed in some instances at country receiving plants or which otherwise must be performed upon receipt of the milk at the city plant. Consequently, it is entirely proper to refer to the added payment to the association as a market differential, for this differential is concerned with handling costs as previously explained. This in no way provides a basis for extending the market differential beyond its normal meaning in order to accommodate it as a nearby differential based upon the location of farms. The "nearby" producer may deliver his milk to a country plant and still receive the nearby differential, and

the non-nearby producer may deliver his milk directly to the city plant or market without receiving the nearby differential, this fact evidencing that the nearby differential is not the authorized market differential which already exists in the milk orders as a separate differential. The case of *Brannan v. Stark* is thus authority for the respondents and presents no conflict with the decision of the court below.

The only other case cited is the *Cranston* district court decision which may not form the basis for the writ and which is patently erroneous. Initially, it should be noted that the trial in *Cranston* commenced on October 18, 1967, subsequent to the hearing of September 5, 1967, in this case concerning the Secretary's attempt to issue new "findings" after the district court's decision of June 15, 1967, invalidating the nearby differential of the Mass.–R.I. milk order. The recommended decision of the Secretary contained "findings" which purported to replace those made in 1937 and to rectify the lack of other findings in the early milk orders. It indicated that the Secretary had relied on the *Green Valley* case, and it adopted various contentions as findings which had theretofore been specifically rejected by the Secretary when no legal action was pending. The district court aptly termed the recommended decision "a brief", and there was no basis for such findings in the hearing record to which it related, many of the statements in the recommended decision being inaccurate or inaccurately portrayed. After inability to change the record during the course of the litigation, the same objective of replacing the pertinent administrative records upon which the Secretary had acted became the focal point of the *Cranston* "trial". The main witness therein was Attorney Reuben Hall, associate counsel of petitioners' attorneys in this case. The attorney for the intervenors in *Cranston* was Frederick Conard, Esq., who was also associated in this case and the *Blair* case with

Attorney Hall and petitioners' counsel. The district court's decision rests largely on the testimony of Attorney Hall and that of one other witness (Kane) who not only replaced the administrative records with their testimony but also presumed to replace the Congressional intent and reports.

No real corroborating evidence of a documentary nature was offered to support the testimony of the witness Kane that the defined and well-known market differential was actually an all-inclusive differential, one embracing any type of differential in markets across the country. The witnesses Kane and Hall had testified to such effect and to their involvement with the National Cooperative Milk Producers Federation in proposing revisions to the Congressional committees that would reflect that the Act and Reports were their handiwork rather than that of the Congress. They failed to produce any of the drafts or other material to which they referred in their testimony, and it is elementary that the submission of a draft or proposed revision of a statute to the Congress does not transfer the legislative intent from the Congress to such individuals. Hundreds of such proposals were received by the Congress in respect to this very Act, but most of such material has little relationship to the final product of the Congress and may not replace either the work or intent of the Congress. Further, an examination of the N.C.M.P.F. draft discloses that it proposed the elimination of the section authorizing individual handler pools, but the Congress retained the same in the Act. This would seem to cast a little doubt on the contentions of such witnesses that they "drafted" the legislation and proposed revisions thereto that disclose the real intent of the Congress. Other examples abound in the draft.

Additionally, the very fact that the particular subsection of the Act enumerates three different differentials

is indicative that the term "market differential" may not include the other two specifically enumerated and defined differentials. Otherwise, the Act would have simply referred to "all market differentials" if this term was meant to be illustrative and all-embracing in nature, rather than being limited to the definite and well-known differential for the direct delivery of milk to a city plant or market. In fact, the N.C.M.P.F. draft, dated June 5, 1935, stated "volume, market or production differentials *or other differentials* customarily used in the market covered by such order." (See App. C, pp. 12-21c). Significantly, this draft distinguishes the market differential as a separate and distinct differential even more than does the Act, if that is possible, and the Congress actually refused to authorize the "other differentials" in limiting adjustments to the uniform price to *only* the enumerated and defined differentials. The introductory phrase of Section 8(c)(5) also states that a milk order shall contain "one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) *no others.*"

It is also noted that the testimony of the witness Kane confuses the nearby differential with the very description of the direct-delivery or market differential defined by both the Senate and the House in their respective Reports. (See App. C, p. 16c). The witness Alpin also appears to confuse these two distinct differentials, both of which exist in this Order (App. C, p. 21c). The testimony of witness Hall, attorney for nearby producers in both *Blair* and *Allen,* is clearly calculated to replace the testimony in the administrative records, including that of economists for his own clients (NEMPA, CMPA) in hearings in which he appeared, that there was no hearing differential as such prior to the Act and Federal regulation. (App. C, pp. 24-30c). Such testimony was necessary to "show" that the nearby differential existed and was "customarily applied" by handlers prior to the Act, as required by the statute.

The district court's opinion in *Cranston* states that "the Connecticut Milk Marketing Order contains three principal adjustments to the uniform price payable to dairy farmers." This statement is fatally inaccurate, as will be hereinafter demonstrated.

The *Cranston* court correctly notes that a butterfat differential is provided for in Section 1015.71 of the milk order under the authority of subsection (b) of the Act relating to "the grade or quality of the milk delivered."

The opinion also states that "Section 1015.62 of the Order . . ., providing for 'plant zone differentials', is also unchallenged . . . Essentially, the purpose of the differential is to reflect in the price received by the farmer the added cost to the handler of moving the milk from the more distant receiving plants into the marketing area for distribution. Such a differential is clearly authorized as an adjustment according to 'the locations at which delivery of such milk is made'." The district court's failure to acknowledge that the plant zone differential embraces the market differential as well as the transportation differential constitutes error that goes to the very basis of its decision.

The district court's opinion then refers to the contested nearby farm location differential as the third differential in the Connecticut milk order, 7 C.F.R. 1015.72, and it purports to uphold this differential under subsection (a) of the Act as the "market" differential "customarily applied by the handlers subject to such order." In order to make this conclusion, however, it was necessary for the district court to cast aside or ignore the plain language of the pertinent Congressional reports defining the market differential, the testimony and evidence in the administrative records going back thirty years, the decisions of the Secretary dealing with this very subject, and the specific wording

of the Act itself. More importantly, the court actually ignored the fact that *the market differential is already in the Connecticut milk order,* and it rested its decision on the incredible testimony of interested witnesses who allegedly "knew of no differentials which would in any way fit the definition of market differentials contained in the reports."

The Congressional reports specifically state that, "The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant." (App. C, pp. 14-16c).

The district court's opinion makes no mention of the fact that such fourth adjustment, the true market or direct delivery differential, is included with the transportation differential as a part of the plant zone location differential:

> "3. *Zone differentials and zoning.* The Massachusetts–Rhode Island and Connecticut orders should provide that the Class I and blended prices applicable at nearby (city) plants be 47 cents per hundredweight above comparable prices for the 21st (201-210 mile) zone. * * * The present nearby plant Class I zone differential of 54 cents is based on two principal factors: (1) *Freight* charges for hauling milk from plants located in the 21st zone to city plants, and (2) *the difference between costs incurred in the assembly of producer milk at country plants for transfer to city plants and costs incurred in receiving milk at city plants directly from producers.* The total *freight* charge allowed in the present differential is 41 cents per hundredweight, which includes a Federal transportation tax no longer in effect. In earlier computations of the difference between country and city

> receiving costs, total *country* plant *handling* costs were considered to be 23 cents per hundredweight. Of the latter amount, 20 cents represented the cost of operating the country plant and the remaining three cents was to cover the cost to the handler in furnishing cans for the shipment of milk from the country plant to the city plant. Handling costs for receiving, weighing, and testing milk received from farms at the city plant were considered to be 10 cents per hundredweight, with the difference between this amount and the country plant handling costs thus being 13 cents. * * *
>
> "It is therefore concluded that the allowance for *transportation* to be reflected in the city plant zone differential should be 37 cents. Further, the *handling* allowance to be reflected in this differential should continue to be 10 cents. Accordingly, the Class I price applicable at nearby (city) plants under the Connecticut order and the proposed Massachusetts–Rhode Island order would be 47 cents greater than the Class I price at plants located in the 21st zone." (29 F.R. 11211).[7]

The foregoing is sufficient to illustrate the basic error of the *Cranston* opinion, and it would be impossible for the district court to rest on a rejection of the Congressional definition if it was aware of the existence of the

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[7] A change of 7-cents in the zone differentials and revision of the mileage zones was recently made in the orders. All "nearby" farm location differential areas were formerly included in the nearby plant zone of the Mass.–R.I. order, but such revision after the *Allen* decision excluded the already limited "nearby" farm areas of Vt., Maine, and N.H. from the nearby plant zone. 32 F.R. 9917, July 6, 1967.

defined market or direct delivery differential as the fourth adjustment in the Connecticut milk order. The testimony of the witnesses is also subject to a built-in inconsistency in attempting to contradict the Congress in this regard, and this is clearly evidenced by the fact that the authorized market differential is included in the plant zone differential of the order.

Such interested witnesses also attempted to attack the Congressional definition in the pertinent reports by referring to the statement in the reports that the market differential "vary with the markets and cannot be qualified as a 'location' differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets."

It has previously been demonstrated that the location or transportation differential is usually determined on the distance from a primary market or principal consumption center and the point at which delivery of the milk is made to the handler. This differential clearly reflected the location value of the milk. The direct delivery of the milk to a city plant or market, however, relates to an element of service that is not limited to the primary market or principal consumption center. There were numerous secondary city markets or plants within every milkshed, and the payment of the market or direct delivery differential, as well as the amount thereof, was necessarily related to the availability of alternative supplies to the handler. This subject was fully covered in the *Blair* case and by the Secretary in his Decision of June 14, 1957, 22 Fed. Reg. 4215, involving the New York–New Jersey milk order. He there discussed the factors involved in payment of such market differential in secondary city markets and in the metropolitan New York City area, and the *Blair* plaintiffs demonstrated that such differentials were paid in varying amounts all over the milkshed prior to promulgation of the New York–New Jersey order in 1957.

In fact, the plaintiffs in *Blair* cited administrative decisions of the Secretary wherein he allowed direct-delivery or market differentials to producers in the Capital District (Albany, Troy, Schenectady) in recognition of the fact that these producers had obtained such premiums and higher prices prior to 1957 when the New York milk order was expanded to include Upstate New York producers as well as those in the State of New Jersey. (See 22 Fed. Reg. 4215).

These Upstate producers are located in the very area as the plaintiffs in the Cranston case, and the Secretary has acknowledged that many of them received market or direct-delivery differentials both prior and subsequent to federal regulation. (See App. C, pp. 22-24c).

Said direct-delivery differentials, the authorized market differential in the Act, were paid in secondary markets in New England as well as in New York State prior to federal regulation. These market or direct delivery differentials are now relegated to the primary market under federal regulation because of the factors of administrative convenience, ability of the handler to pay such differential over the uniform minimum price as a premium without providing for the same in the regulations, enforcement problems resulting from varying alternative supplies in different secondary markets and refusal of handlers to pay the differential under such conditions.

Such market or direct delivery differential adopted the present "practice of business" when the Congressional reports were written in 1935.

The contentions made by the interested witnesses and upon which the district court predicated its decision are thus completely erroneous.

Moreover, the Secretary and nearby producers in *Cranston,* represented by Attorney Conard, associate of petitioners' counsel herein, stressed the differences between the Connecticut order and this order when respondents attempted to hold *Cranston* in abeyance pending a decision on the *Allen* appeals.

The Secretary's opposition stated as follows in successfully arguing distinguishability:

"(2) The Connecticut Order and the Massachusetts-Rhode Island Orders are two separate Orders, promulgated at different times, involving different marketing areas, and necessitated by different market conditions. Indeed, in 1962, a proposal was made to consolidate the Connecticut Order with the Massachusetts-Rhode Island Order, but this proposal was rejected due to the Secretary's finding that:

'Because the major problems pertaining to intermarket relations in New England do not involve the Connecticut Market, the consolidation of the Connecticut Order with any of the other New England Orders is not presently warranted.' (29 Fed. Reg. 11205-06)."

Additionally, the *Cranston* court stressed the same differences when respondents attempted to show that *Cranston* was being used by the attorneys herein to relitigate this case and affect its disposition and escrowed monies:

"THE COURT: Well, I know this isn't probably an appropriate place for argument I don't intend to belabor it, but it surely does seem to me to be so elemental that we should all be able to agree * * * that the facts of this case, the *Cranston* case, are different from the facts of the *Blair* case. Specifically, this is an entirely different administrative order before this Court than there was before the Court in *Blair,* and you have – in my view, from what I have seen of it – a distinctly different milk marketing order. You have quite a different order before the Court here, the so-called Connecticut order, than there was before the *Blair* court or before the *Allen* court * * *. * * * but we do have here, as I understand it, three distinctly different marketing orders, so that I have a little trouble following you * * * I don't think the same decision necessarily flows or

should necessarily flow in this case as in the *Blair* case or *Allen* case, being given the same legislative material. They are being applied with a different set of facts."

The other points raised by the petitioners do not merit any reply or the same have been answered in the other briefs filed herein. The cases cited by petitioners in respect to remand obviously do not support their contentions here. The lower courts gave detailed and exhaustive consideration to every relevant factor, and the record is extremely extensive, embracing every administrative hearing record and milk order from 1936 to that containing the challenged differential. The respondents are of the respectful view that unfactual assertions do not constitute a basis for the granting of the writ, and the statements of the petitioners that the ruling below or the failure of this Court to grant certiorari could invalidate other differentials is devoid of factual content, the example furnished in footnote 20 on page 15 of petitioners' brief being evidential of the lack of logic and merit in such *in terrorem* contentions. The petitioners have totally failed to demonstrate any reason for the granting of the writ, and the respondents will be further injured by any undue delay in the disbursement of their escrowed monies under the supervision of the district court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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